In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1235

WILLIAM MARTIN AND PRINCE PARKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 372 F. 2d 63.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1967. A petition for rehearing was denied on March 9, 1967 (Pet. App. 16a). The petition for a writ of certiorari was filed on April 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal narcotics agent, who monitored telephone conversations on an extension tele-

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phone with the consent of one party, was properly permitted to testify about those conversations at trial.

2. Whether the trial court's instructions regarding declarations of joint venturers was proper.

STATUTES INVOLVED

Article 14 of the Illinois Criminal Code of 1961, Ill. Stat. Ann., ch. 38, Art. 14 provides in pertinent part:

> § 14–1
>
> (a) Eavesdropping device
>
> An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; * * *.
>
> * * * * *
>
> § 14–2
>
> A person commits eavesdropping when he:
>
> (a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto * * *.
>
> * * * * *
>
> § 14–5
>
> Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial * * *.

STATEMENT

Each of the petitioners was convicted, after a jury trial in the United States District Court for the Northern District of Illinois, on a four-count indictment charging the sale of heroin in violation of 21

U.S.C. 174 and 26 U.S.C. 4705(a). On December 21, 1965, petitioner Martin was sentenced to imprisonment for eight years on each count, the terms to run concurrently, and petitioner Parker to five years on each count, the terms to run concurrently. The court of appeals affirmed.

The government's evidence (the sufficiency of which is not challenged here) showed that on January 11, 1965, narcotics agent Turnbou was introduced to petitioner Martin by an informer, Kathryn Bullock (Tr. 23–24).[1] Turnbou asked Martin for an ounce of heroin, and gave Martin $625 for that purpose. Martin then said: "Go back to the house and wait for a phone call from Prince [petitioner Parker] after it gets dark." Turnbou and the informer then returned to the latter's apartment (Tr. 26–27), where Turnbou told her that he wanted to listen to the telephone conversation which was expected. The informer said that was agreeable to her, and showed the agent to the extension telephone (Tr. 32–33). At 5:15 p.m., Parker called and said to the informer (with Turnbou listening on the extension): "Hi, Bert, this is Prince. Meet me in about 15 minutes at McDonald's on 71st Street" (Tr. 36). The three subsequently met, and Parker delivered 25.52 grams of heroin hydrochloride (Tr. 40, 156).

On January 26, Turnbou and Miss Bullock again met Martin. Turnbou gave Martin $725 this time, and Martin again told them to return to the informer's

[1] "Tr." designates the transcript of trial which we are lodging with the Clerk of this Court.

apartment and await a telephone call (Tr. 48–52). Turnbou had again obtained consent from Miss Bullock to listen on the extension telephone (Tr. 54–55). Parker called and said: "Bert, meet me in a half an hour at 63rd and Stewart" (Tr. 57). After they met, Parker handed 25.09 grams of heroin hydrochloride to Turnbou (Tr. 58, 157).

ARGUMENT

1. The trial court did not err in permitting Turnbou to testify as to the conversations between Parker and Miss Bullock which he overheard. An argument that his use of the extension telephone constituted a violation of Section 605 of the Federal Communications Act is precluded by *Rathbun* v. *United States*, 355 U.S. 107. Here, the record (*e.g.*, Tr. 32–33, 54–55) amply supports the findings of both courts below that Miss Bullock consented to the use of her regularly installed extension telephone. There is no evidence supporting petitioner's contention, raised first in the court below, that the informer was coerced into giving consent.[2]

Nor did Turnbou's action constitute a criminal offense under the Illinois eavesdropping statute (Article 14 of the Illinois Criminal Code of 1961), as asserted by petitioners (Pet. 10–14). As pointed out in

[2] Petitioners further suggest (Pet. 6) that the error was compounded by the fact that the informer did not also testify to the conversations. See the concurring opinion by the Chief Justice in *Lopez* v. *United States*, 373 U.S. 427, 441–446. We have been advised by the United States Attorney in Chicago that Miss Bullock died on March 21, 1965, some seven months prior to the trial of petitioners.

our brief in opposition in *Watkins* v. *United States,* pending on petition for certiorari, No. 976, this Term, that statute proscribes only the use of an eavesdropping device to hear a conversation "without the consent of any party thereto". Ill. Stat. Ann., ch. 38, § 14–2 (*supra,* p. 2). On March 24, 1966, more than a year after the monitoring herein challenged, and four months after petitioners' trial, the Illinois Supreme Court ruled that the eavesdropping statute prohibited the introduction of evidence against a person who had not consented to the monitoring. *People* v. *Kurth,* 34 Ill. 2d 387, 216 N.E. 2d 154. Contrary to petitioners' contention, however, the court did not hold that monitoring with the consent of only one party was in violation of the statute; it rejected this construction and held merely that the evidence so obtained was intended by the legislature to be admissible only against the consenter (216 N.E. 2d at 158). In these circumstances, there is no reason to consider the appropriateness of sanctions under this Court's supervisory authority (see *Lopez* v. *United States,* 373 U.S. 427, 440); the evidence so obtained is properly admissible in a federal criminal proceeding. *Wolfe* v. *United States,* 291 U.S. 7, 12–13; Rule 26, F.R. Crim. P. (see Pet. App. 5a–6a).

Turnbou's testimony about the overheard conversations was not in violation of the hearsay rule. These extra-judicial statements were admissible against Parker as admissions, and were admissible against Martin upon the basis of the showing that he was engaged in a joint venture with Parker. *United*

States v. *Olweiss*, 138 F. 2d 798, 799–800 (C.A. 2); *Fuentes* v. *United States*, 283 F. 2d 537, 539–540 (C.A. 9).

Nor was Turnbou's testimony that Miss Bullock consented to his use of her extension telephone hearsay evidence. Turnbou testified to what he heard Miss Bullock say, and petitioners had ample opportunity to cross-examine the agent to determine if Miss Bullock actually voiced her consent.

2. The trial court's instructions with respect to the use of declarations of joint venturers (Pet. App. 10–14) were proper in all respects. *United States* v. *Olweiss, supra; Fuentes* v. *United States, supra.* These instructions, given at various times during the trial and in the court's final charge, were clearly responsive to petitioners' hearsay objections. The jury was specifically charged that the declarations of one was admissible against the other alleged joint venturer only if they found a common scheme or plan (Pet. App. 10–11, 12–13, 14). The instructions thus did not have the effect of requiring the finding of a common scheme or plan. That a joint venture was actually in existence was plainly shown by ample evidence, however.

CONCLUSION

For the reason stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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